

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:) Docket No. 10-2002-L-1895
)
) REVIEW DECISION AND FINAL ORDER
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)
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)
)
Appellant) Child Care Agencies – Day Care

THE NATURE OF THIS ACTION

Administrative Law Judge (ALJ) Wynne O'Brien Persons conducted a pre-hearing conference pursuant to a Department Motion for Summary Judgment in this matter and issued an Order of Dismissal on December 4, 2002. On December 12, 2002, the Appellant filed a petition for review of that Order of Dismissal with the Department's Board of Appeals. In ***** petition for review the Appellant argued as follows:

I want to appeal the initial decision because: I received notification from CPS on or around October 18th, 2002 stating that they had found that there was neglect/lack of supervision of a child in my care. On October 25, 2002 I received a letter from Shannon Selland stating that the allegation of Lack of Supervision is valid. Then on that same day, I received another letter [from] DSHS stating that they had suspended and revoked my license to have a daycare. I immediately called DSHS at 4:05 PM. I received no reply to the message that I had left. I then left a voice message for Alice Anderson (Daycare Licenser) & Teresa Edwards (Licensing Supervisor).

On Saturday the 26th of October 2002, I sent a certified letter requesting a Hearing, as per the instructions in the paperwork that I received from DSHS. Then on October 27th, 2002, I sent a letter to the Office of Administrative Hearings requesting for a stay of suspension of my license to operate my daycare.

On Monday 28th of October 2002, I went down to DSHS and talked with Alice Anderson (Daycare Licenser) & Teresa Edwards (Licensing Supervisor) about the CPS papers I had received, along with the paperwork regarding having my Daycare License being revoked and suspended. They informed me to get into contact with the Attorney General's Office and talk to Charnelle Bjelkengren, the AAG, Department Rep. I was also advised to request a hearing with the Office of the Administrative Courts, of which I had done over the prior weekend.

I neglected to respond to the paperwork from CPS, as I figured that the notification from DSHS superceded the paperwork received from CPS, as it pertained to my keeping my license. At no time does one letter refer to the other in the steps that must be followed for proper protocol.

How the decision should be changed: Grant a hearing to determine the final status of my daycare license.

The importance of certain facts which were presented at the hearing: I was unclear at the time of receiving both sets of paperwork as to which steps I was to follow. I was not disputing the finding by CPS but was claiming mitigating circumstances. All that I wanted was a chance to be heard as to what had exactly transpired and to what steps that I had taken to ensure the safety of the children in my care. I sought outside assistance from the parties that issue my license and had followed instructions that I was provided with.

Each letter does state different instructions as to what a party is to do in response to each letter. The paperwork received from DSHS does not state that before I can request a hearing I must first respond to the allegations from CPS. The CPS letter only states that if you disagree with the founded report of child abuse or neglect and wish to challenge that report, you have certain options available to you. It does not give you alternatives in case you may not disagree with the report but wish to explain.

I do understand that I neglected to follow proper protocol, but when faced with losing my license, I was distraught and unclear of what steps that I was to take. I have been providing daycare for the last 30 years and have never been in this situation before, nor have I known anyone in this situation. But I do feel that there were mitigating circumstances as to the lack of response to the CPS notification. Since my last court hearing, I have spoken with Kelly at CPS in Olympia and she advised me to complete and forward the original review request to CPS, of which I did on November 27th, 2002.

With this, I am formally requesting a review of the finding that was issued on December 4th, 2002, by the Administrative Law Judge, Wynne O'Brien Persons.

On December 20, 2002, the Department filed a response to the Appellant's petition for review and argued as follows:

The Department of Social and Health Services, Office of Child Care Policy (hereinafter "Department"), by and through its attorneys, Christine O. Gregoire, Attorney General, and Charnelle Bjelkengren, Assistant Attorney General, respectfully submits the Department's Response to Appellant's Appeal of Administrative Decision.

I. Facts: On or about July 11, 2002, Child Protective Services (CPS) received a report alleging physical neglect/lack of supervision of a child. (See Exhibit 2).¹ The report identified ***** as the person who may have been responsible for the physical neglect/lack of supervision while ***** was caring for the child under ***** family home daycare license. (See Exhibit 2). In a letter dated October 16, 2002, Robert Tadlock, Division of Licensed Resources, Child Protective Services (DLR/CPS) Supervisor, notified ***** that the Department had determined the allegation was founded. (Exhibit 3). The notification letter detailed *****'s right to challenge the CPS finding. The letter advised ***** that the finding of neglect could affect ***** day care license. The letter also indicated that questions should be directed to Robert Tadlock at a telephone number, which was provided. The letter was sent via certified mail to *****'s address on record and received by ***** on October 23, 2002. (See Exhibit 3, page 5,

¹ All exhibit references are to the Exhibit list attached to the Department's Motion for Summary Judgment filed on November 26, 2002.

signature card for certified letter). ***** did not seek internal review of the finding of neglect. (See Declaration of ***** , Exhibit 12).

***** was licensed to operate a family home daycare at ***** under license #*****. ***** moved to a new location the second week of September 2002 and applied for license at the new location on August 28, 2002. Because of the pending CPS investigation, no license was issued for the new location. Instead, the Department issued a letter in lieu of licensing on September 30, 2002. (See Department's Memorandum in Opposition to Stay for further details on the change in licenses). This letter extended ***** license until October 31, 2002.

In a letter dated October 24, 2002, Theresa Edwards, Licensing Supervisor for the Division of Child Care and Early Learning, informed ***** that ***** application for a daycare license at the new address was denied. (See Exhibit 10). On the same date, ***** was notified that the temporary license under which ***** had been operating at the new address was summarily suspended and revoked. (See Exhibit 6). The sole basis for the denial was the finding of physical neglect/lack of supervision. Both letters were personally served on ***** on October 24, 2002. ***** thereafter filed an appeal of the denial, summary suspension and revocation, which was received in Olympia on October 28, 2002. (See Exhibit 11).

The Department noted a motion for summary judgment and filed exhibits in support of the motion (Motion and Memorandum of Authorities in Support of Department's Motion for Summary Judgment filed on November 27, 2002). On December 3, 2002, the Office of Administrative Hearings heard arguments regarding the Department's Motion for Summary Judgment. An Initial Decision granting the Department's motion was issued on December 4, 2002. On December 12, 2002, the Appellant timely requested an administrative review of the Initial Decision.

II. Standard of Review: Administrative review of an initial order is governed by RCW 34.05.464 and WAC 388-02-0560 through 0635. A review of an initial order is completed by a review officer, who is designated as a review judge in matters involving the Department of Social and Health Services. RCW 34.05.464, WAC 388-02-0560. The review judge exercises the same decision making authority as an administrative law judge from the Office of Administrative Hearings when the issues on review relate to licensing. WAC 388-02-0600. The scope of review is generally limited to evidence presented at the administrative hearing. WAC 388-02-0565. A party raises issues on review by citing parts of the hearing decision with which the party disagrees and the evidence supporting the party's position. WAC 388-02-0580.

III. The Department is required by statute and administrative code to take adverse action against the day care license of any person found to have committed abuse or neglect of a child. ***** failed to appeal the finding of neglect issued on October 16, 2002. In response to the Department's motion for summary judgment, ***** did not contest the events that lead to the finding of neglect. (Order of Dismissal, dated December 4, 2002.) Further, in ***** appeal letter, ***** concedes that ***** did not intend to dispute the finding of neglect by CPS. (Appellant's Request for Review of Initial Decision, page 2). Rather, ***** indicates that ***** wished to explain mitigating circumstances. However, ***** failed to do so, despite the clear language of the letter sent to ***** by Robert Tadlock, DLR (Exhibit 3). This letter explains that a finding of neglect may affect ***** day care license. It also provided ***** with a contact telephone number if ***** had questions. ***** failed to appeal, thus the finding of neglect is final. The Administrative Law Judge correctly concluded that because ***** failed to request an internal review of ***** finding of neglect, ***** is prohibited from requesting a hearing with the Office of Administrative Hearings.

The Administrative Law Judge also correctly concluded that because ***** has a finding of neglect, the Department has no alternative but to deny ***** application for a family home day care. WAC 388-155-090(2)(a) provides, in part, "The Department *must* deny, suspend, revoke, or not renew the license of a person who: has abused [or] neglected ... a child" (emphasis added); *See also* RCW 26.44.202 *defining "abuse or neglect."* The language is mandatory. When there is a finding of neglect, the Department is required to take adverse action against a license.

In ***** request for review, ***** argues the "paperwork received from DSHS does not state that before I can request a hearing I must first respond to the allegations from CPS." However, there is no requirement that ***** address the finding of neglect before ***** appeals ***** license denial. Rather, a finding of neglect simply precludes ***** from being licensed to operate a day care. Again, this is addressed in the letter, which explained ***** right to appeal the finding of neglect. (Exhibit 3).

IV. Conclusion: The issue presented to the Office of Administrative Hearings was a motion for summary judgment. The Administrative Law Judge's duty was to determine whether or not there was a dispute as to any material fact, and if not, whether the Department was entitled to a judgment as a matter of law. WAC 388-155-090(2) provides that the Department must deny an application where a person has a finding of neglect. Further, the Department must suspend/revoke a license when a person has a finding of neglect. The parties agree that ***** has a finding of neglect, which was never appealed. In fact, ***** does not dispute the finding. Thus, the Administrative Law Judge properly granted the Department's Motion for Summary Judgment and upheld the Department's action.

FINDINGS OF FACT

The Order of Dismissal's findings of fact are set out below. Material that has been deleted has been struck through, and material that has been added has been italicized.

1. On or about July 11, 2002, the Child Protective Services (CPS) division of the Department received a report alleging physical neglect/lack of supervision of a child. (Exhibit 2). The report identified Appellant ***** as the person who may have been responsible for the physical neglect/lack of supervision while ***** was caring for the child under Appellant's *family child day care home* license.

2. Robert Tadlock, Division of License Resources, CPS (DLR/CPS) notified Appellant by letter dated October 16, 2002, that the Department had determined the *neglect* allegation was "founded" *under the definition of child abuse, neglect, or exploitation at WAC 388-15-130(3)(f), which includes failing to provide supervision necessary to a child's health and*

safety. (Exhibit 3). The letter was sent certified and Appellant received the letter on October 23, 2002.

3. The October 16, 2002, letter stated that Appellant had the right to contest the Department's *finding conclusions*. (Exhibit 3). The letter also stated that a "founded" finding such as the one rendered against Appellant may affect ****** family child day care home* license. The letter instructed Appellant that to contest the "founded" finding ******* needed to request an internal review of such finding, in writing, with CPS within 20 days from the receipt of the letter. A form was provided and a CPS address. Robert Tadlock's telephone number was on the letter should Appellant have any questions about the process.

4. Appellant was sent two letters by the Division of *Child Care and Early Learning, Licensing Resources (DLR)*, a division of the Department, on October 24, 2002. (Exhibits 6 and 10). Both letters were signed by Theresa Edwards, Licensing Supervisor. Appellant received these letters on approximately October 26, 2002. The first letter informed Appellant that ****** family child home day care home* license was being summarily suspended and revoked *because ***** had failed to comply with minimum licensing requirements found in WAC 388-155-120 (provider-child interactions) and in WAC 388-155-090(2)(when can my license application be denied and when can my license be suspended or revoked)* due to the CPS founded finding of physical neglect *that had been entered against ******. (Exhibit 6). The second letter informed Appellant that ****** family child home day care home* application was being denied *because ***** did not meet the minimum licensing requirements of WAC 388-155-090(1), (3)(a), (3)(c), and (3)(e)* due to the CPS founded report of physical neglect. (Exhibit 10). Both letters informed Appellant that ******* could contest the *Department's decisions DLR action* by requesting a hearing with the Office of Administrative Hearings within 28 days from when the Appellant received the October 24, 2002, letters.

5. Appellant spoke to ******* day care licensors, Alice Anderson, and Ms. Edwards on October 28, 2002. Appellant brought with ******* the October 24, 2002, letter. It is unclear

whether Appellant also provided a copy of the October 16, 2002, CPS letter to Ms. Anderson. Appellant asked what ***** needed to do to keep ***** day care license. Appellant was instructed to file a request for hearing with the Office of Administrative Hearings within the required 28 days.

6. Appellant filed ***** Request for Hearing with the Office of Administrative Hearings on October 28, 2002. (Exhibit 11). Appellant asked the Department to reconsider the denial of ***** license and *asserted* that ***** would take steps to insure that the neglect incident would never happen again.

7. Appellant never filed a request for an informal review with CPS. (Exhibit 12).

8. Appellant was under the belief that ***** was doing what was required of ***** when ***** filed ***** Request for Hearing on October 28, 2002. ***** relied upon the advice of ***** daycare licensors Ms. Anderson and Ms. Edwards. Appellant believed that ***** request for hearing would cover all the necessary bases. Appellant did not contest that ***** had committed the actions from which the founded report of physical neglect arose and therefore did not believe that it was required that ***** contest the CPS *finding report*. Appellant only wanted to retain ***** *family child day care home* license.

CONCLUSIONS OF LAW

1. The Appellant's petition for review was timely filed and is otherwise proper. WAC 388-02-0575. Jurisdiction exists for the undersigned Review Judge to review the initial hearing decision and to issue the final agency decision in this matter.

2. In administrative hearings involving the Department's decision to revoke or deny a family child day care home license, the undersigned exercises all the authority that was available for the ALJ to exercise at the hearing. This includes the authority to modify the ALJ's findings of fact or enter new findings of fact, which the undersigned has done. RCW 34.05.464(4), WAC 388-02-0600(1).

3. The statute that governs administrative hearings in family child day care home license cases is the Revised Code of Washington (RCW) 74.15.130. Relevant parts of this statute state, with emphasis added:

(1) An agency may be denied a license, or **any license issued pursuant to chapter 74.15 RCW** and RCW 74.13.031 **may be** suspended, **revoked**, modified, or not renewed **by the secretary upon proof (a) that the agency has failed or refused to comply with** the provisions of chapter 74.15 RCW and RCW 74.13.031 or **the requirements promulgated pursuant to the provisions of chapter 74.15 RCW** and RCW 74.13.031; ...

...

(3) **In any adjudicative proceeding regarding the** denial, modification, suspension, or **revocation of any license under this chapter**, other than a foster family home license, **the department's decision shall be upheld if it is supported by a preponderance of the evidence.**

4. Chapter 388-155 of the Washington Administrative Code (WAC) contains the minimum licensing requirements for family child day care homes. The Department has adopted (promulgated) these requirements/regulations under the authority of chapter 74.15 RCW. WAC 388-155-005. One of these regulations, WAC 388-155-090(3)(a), states that," [the Department] must deny, suspend, or revoke your license if you: (a) Have been found to have abused, neglected, or sexually exploited a child as defined in chapter 26.44 RCW and WAC 388-15-130." The Department has met its burden of proving by a preponderance of the evidence that the Appellant has failed or refused to meet the requirements of WAC 388-155-090(3)(a). A founded finding of child neglect has been entered against the Appellant under the definitions in WAC 388-15-130(3) which was not challenged by the Appellant through the statutory process set out in RCW 26.44.125. The undersigned must uphold the Department's decisions to revoke ***** family child day care home license and to deny ***** application for a new family day child day care home license.

5. In the Order of Dismissal, the ALJ has thoroughly discussed the legal consequences of the Appellant's failure to request internal agency review of the CPS finding of

neglect under RCW 26.44.125(2). The undersigned will only add that the Appellant is correct when ***** argues in ***** petition for review:

I was not disputing the finding by CPS but was claiming mitigating circumstances. ... The CPS letter only states that if you disagree with the founded report of child abuse or neglect and wish to challenge that report, you have certain options available to you. It does not give you alternatives in case you may not disagree with the report but wish to explain.

No procedure has been created by rule or statute whereby a person who agrees with a CPS finding but asserts the existence of mitigating circumstances can present those mitigating circumstances.

6. The conclusions of law in the Order of Dismissal are correct as a matter of law and are affirmed. The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

DECISION AND ORDER

The Order of Dismissal is affirmed.

Mailed on January 16, 2003.

CHRISTINE STALNAKER
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: ***** , Appellant
Charnelle Bjelkengren, AAG, Dept's Rep.
Leslie Edwards-Hill, Program Administrator, *****
Judy Matthias, Program Administrator, *****
Roselyn Oreskovich, Asst. Sec. Children's Admin, *****
Wynne O'Brien Persons, ALJ, ***** OAH